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NO. 95-1566

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CRANE VESSEL TITAN 5, *in rem*, and its Claimant, FAR EASTERN MARINE EXPLORATION DRILLING COMPANY,

Petitioners,

v.

OIL SERVICES AND TRADING, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF PETITIONERS

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MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Movant, The Maritime Law Association of the United States (hereinafter "MLA"), moves the Court for permission to file an *amicus curiae* brief in support of the Petition for Writ of Certiorari filed by the Crane Vessel TITAN 5 and its Claimant, Far Eastern Marine Exploration Drilling Company (collectively "Petitioners"). Petitioners have given consent to the MLA to file an *amicus* brief. Respondents Oil Services and Trading, Inc., Entron, Ltd., Entron Offshore (A.P.) Pte., Ltd., Double Eagle Marine, Inc., Inland Marine Service, Inc., Ocean Marine Contractors, Inc., L&L Oil Company, Inc., Seabulk Offshore, Ltd., Versabar, Inc., Coral Marine Services, Inc., Shannon Hardware Co., Ltd., Taylor Industrial Specialties, Inc., Central Boat Rentals, Inc., Patterson Marine, Inc., Associated Welding Supply, Inc., Bridon Elms, Inc. and King Trucking, Inc. have refused to consent. Accordingly, leave to file must be sought pursuant to Rule 37.2(b) of the Court.

NATURE OF MOVANT'S INTEREST

The MLA is a nationwide bar association founded in 1899, with a membership of about 3,600 attorneys, law professors, and others interested in maritime law. Its attorney members, most of whom are specialists in admiralty law, represent all maritime interests — ship owners, charterers, cargo interests, port authorities, seamen, longshoremen, passengers, underwriters, and other maritime claimants and defendants. The MLA has filed *amicus* briefs in a number

of cases in this Court involving questions of maritime law and practice.[1]

This case concerns the meaning and interpretation of § 1605(b) of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 (hereinafter "FSIA"). The MLA participated in the drafting of the maritime provisions of the FSIA as initially enacted in 1976, including specifically § 1605(b), the section at issue in this case. The 1988 amendments to the Act are maritime provisions and include revisions to § 1605(b) and the addition of §§ 1605(c), 1605(d), and 1610(e). All of these amendments were initially drafted by an MLA Committee. In addition representatives of the MLA testified in support of the FSIA both at the time of its initial enactment and in connection with the amendments that were enacted in 1988. *Jurisdiction of U.S. Courts in Suits Against Foreign States, Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary,* 94th Cong., 2nd Sess. 91-99 (1976) (statement of Michael Marks Cohen, Chairman, MLA Comm. on Maritime Legislation); *Arbitral Awards, Hearings on H.R. 3106, 3137, 4342 and 4592 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary,* 99th Cong., 2nd Sess. 142-160 (1986) (statement of William R. Dorsey, III, Chairman, MLA Comm. to Amend the FSIA); *Foreign Sovereign Immunities Act, Hearings on H.R. 1149, 1689 and 1888 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary,* 100th Cong., 1st Sess. 144-163 (1987) (statement

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[1] *E.g. Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER,* _____ U.S. _____, 115 S.Ct. 2322 (1995); *Jerome B. Grumart, Inc. v. Great Lakes Dredge & Dock Co.,* _____ U.S. _____, 115 S.Ct. 1043 (1995); *McDermott, Inc. v. Air Clyde and River Don Castings Ltd.,* _____ U.S. _____, 114 S.Ct. 1461 (1994). For a listing of other cases, see The MLA Report, Doc. No. 671 at 8862-63 (1987).

of William R. Dorsey, III, Chairman, MLA Comm. to Amend the FSIA).

The MLA is seeking to file an *amicus* brief because the decision of the Court below seriously misconstrues the intent, purpose, and meaning of § 1605 of the FSIA. As a party which participated in the long series of discussions and drafting that led to the adoption of the Act in 1976, and which drafted the amendments to the Act in 1988, the Association is well aware of the impact that the incorrect reading of the Act by the court below will have on maritime commerce and this country's relations with foreign states whose vessels call at United States ports. As drafter and supporter of key maritime provisions of the Act that were interpreted by the court below, the MLA is uniquely situated to show the error of the decision below, the serious effect such a decision will have on vessels owned by foreign states calling in this country, and the adverse diplomatic consequences that will result.

The MLA therefore respectfully moves for leave to file its brief herein.

DATED April 24, 1996

Respectfully Submitted,

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QUESTION OF LAW PRESENTED

Does § 1605(b) of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611, permit a maritime lien claimant to arrest, and bring an *in rem* action against, a vessel owned by a foreign state?

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

The Maritime Law Association of the United States (hereinafter "MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Writ of Certiorari filed by the Crane Vessel TITAN 5 and its Claimant, Far Eastern Marine Exploration Drilling Company ("Petitioners").

INTEREST OF *AMICUS CURIAE*

The MLA is a nationwide bar association founded in 1899, with a membership of about 3,600 attorneys, law professors, and others interested in maritime law. Its attorney members, most of whom are specialists in admiralty law, represent all maritime interests — ship owners, charterers, cargo interests, port authorities, seamen, longshoremen, passengers, underwriters, and other maritime claimants and defendants.

The purposes of the MLA are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives, the MLA has sponsored a wide-range of legislation dealing with maritime matters during its

97 years of existence, including the Carriage of Goods by Sea Act,[1] the Federal Arbitration Act,[2] and, more pertinently, the Foreign Sovereign Immunities Act.[3] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[4]

The MLA also participates in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL"), and trade and development ("UNCTAD"), and works closely with the International Maritime Organization ("IMO"). The MLA also actively participates as one of some fifty-five national maritime law associations constituting the Comité Maritime International in a movement to achieve maximum international uniformity in maritime law through the medium of international conventions.

The MLA has filed *amicus* briefs in a number of cases, including briefs accepted by this Court.[5] It is the policy of the MLA to participate as *amicus curiae* only when important issues of maritime law or practice are involved and only when the effect of the Court's decision may be substantial. The By-laws of the MLA require that its participation as *amicus curiae* must be approved by the President, in consultation with the First and Second Vice-Presidents, and then submitted to the Board of Directors. The By-laws

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[1]46 U.S.C. §§ 1300-1315.

[2]9 U.S.C. §§ 1-5.

[3]28 U.S.C. §§ 1330, 1602-1611 (hereinafter "FSIA").

[4]E.g. Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376; Convention on the International Regulations for Preventing Collisions at Sea, 28 U.S.T. 3459, as amended, T.I.A.S. 10672, Oct. 20, 1972, reprinted in *6 Benedict on Admiralty*, Doc. No. 3-4 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 1996); see 33 C.F.R. Ch. 1, Subch. D, Special Note, at 176 (1995); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

[5]See Note 1 in Motion for Leave, *supra*.

provide that such approval must be given sparingly and only when certain criteria are met. One of the criteria set forth in the By-laws is, "Whether or not the outcome of the litigation would affect the meaning of a law or treaty advanced by the Association." By-laws of The Maritime Law Association of the United States, § 702.3(d).

This case concerns the meaning and interpretation of § 1605(b) of the FSIA. The MLA participated in the drafting of the maritime provisions of the FSIA as initially enacted in 1976, including specifically § 1605(b), the section at issue in this case. The 1988 amendments to the Act are maritime provisions and include revisions to § 1605(b) and the addition of §§ 1605(c), 1605(d), and 1610(e). All of these amendments were initially drafted by an MLA Committee. In addition representatives of the MLA testified in support of the FSIA both at the time of its initial enactment and in connection with the amendments that were enacted in 1988.[6] Accordingly, the provisions of the FSIA that are at issue in this case fall directly within the criteria set forth in its By-laws because the outcome of the litigation does affect the meaning of provisions in a statute that were drafted and advanced by the Association. As one

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[6]*Jurisdiction of U.S. Courts in Suits Against Foreign States, Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2nd Sess. 91-99 (1976) (statement of Michael Marks Cohen, Chairman, MLA Comm. on Maritime Legislation); *Arbitral Awards, Hearings on H.R. 3106, 3137, 4342 and 4592 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2nd Sess. 142-160 (1986) (statement of William R. Dorsey, III, Chairman, MLA Comm. to Amend the FSIA); *Foreign Sovereign Immunities Act, Hearings on H.R. 1149, 1689 and 1888 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 144-163 (1987) (statement of William R. Dorsey, III, Chairman, MLA Comm. to Amend the FSIA).

of the parties that actively participated in the drafting, support, and enactment of the FSIA, the MLA has an interest in seeing that the Act is properly read and interpreted according to its intent and purposes.

SUMMARY OF ARGUMENT

The decision of the court below opens the door to the very types of diplomatic controversies and tensions that Congress, at the urging of the Executive, through the Departments of State and Justice, and supported by the MLA and the American Bar Association, sought to avoid by passage of the FSIA. As a result of the decision vessels owned by a foreign state are now subject to *in rem* arrest in the Fifth Circuit, and perhaps other Circuits as well, in contravention of the clear meaning and intent of the FSIA. Much of the shipping that calls daily at U.S. ports is owned by foreign states. Accordingly, the decision below will adversely affect a large number of vessels and create the very type of diplomatic tension that Congress and the State Department sought to avoid.

The decision of the court below misinterprets the language of the FSIA, ignores its legislative history, and is in conflict with learned commentary on the Act and all but one of the cases on the issue. If allowed to stand, the decision could also affect the interpretation of the Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (hereinafter "Suits in Admiralty Act") because the pertinent language of § 1605 of the FSIA is based on similar language in the Suits in Admiralty Act.

An important federal statute, one that impacts on our relations with foreign sovereigns, has been badly misconstrued. The adverse impact of this decision will be significant. This Court should act now to correct the error.

ARGUMENT

I. THE DECISION OF THE COURT BELOW WILL ADVERSELY AFFECT DIPLOMATIC RELATIONS AND THWARTS THE INTENT OF CONGRESS AND THE EXECUTIVE BRANCH

By holding that §1605(b) of the FSIA permits the arrest of, and an *in rem* action against, a vessel owned by a foreign state, the Court of Appeals for the Fifth Circuit has seriously misinterpreted the Act. In so ruling, the court has ignored the language of the FSIA, the clear legislative history, and the weight of authority construing the pertinent provisions of the Act. Although unpublished, under the rules of Court of Appeals for the Fifth Circuit the decision may be cited and used as precedent.[7] It is binding on Courts in the Fifth Circuit. A number of America's most important ports lie in the Fifth Circuit, e.g., New Orleans, Lake Charles, Ports of South Louisiana, Plaquemine, St. Bernard, Houston, Galveston, Corpus Christi, Beaumont, Gulfport, and Baton Rouge. The Mississippi River ports of Plaquemine, St. Bernard, New Orleans, South Louisiana and Baton Rouge, if treated as one port, would be the largest in the United States in terms of tonnage. In terms of grain tonnage they would be the world's largest. All ships owned by foreign states

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[7]Local Rule 47.5.3 of the Fifth Circuit Court of Appeals states: *Unpublished Opinions Issued Before January 1, 1996.* Unpublished opinions issued before January 1, 1996 are precedent. However, because every opinion believed to have precedential value is published, such an unpublished opinion should normally be cited only when the doctrine of res judicata, collateral estoppel or law of the case is applicable (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). If such an unpublished opinion is cited in a brief, motion or other document being submitted to the court, a copy shall be attached to each copy of the brief, motion or document.

are now potential subjects of arrest and seizure in those ports.[8] The impact is not limited to those ports. The maritime bar is a small bar and news of developments in maritime practice travels fast. There is little doubt that one of the effects of this decision is that foreign state-owned vessels in other ports will be subject to arrest and seizure. The impact will be substantial. Many of the vessels of the world's commercial fleet are owned by foreign states. Two of the largest commercial fleets in the world, the Russian and the mainland Chinese, are state owned. So too are the fleets of most third-world and former communist bloc nations. Significant numbers of these state-owned vessels which call daily at United States ports may now be subject to potential prejudgment arrest and *in rem* actions.

This is precisely the type of situation which so concerned the State Department and was an important factor in its espousal of the FSIA, including the provision that would prohibit the arrest of foreign state-owned vessels. Prior to its passage, Mr. Mark Feldman, the Deputy Legal Adviser of the Department of State charged with coordinating the sovereign immunity legislation for the Legal Adviser, addressed a meeting of the MLA on May 3, 1974. In his remarks he stressed the concern of the State Department over the arrest of vessels owned by foreign sovereigns. He noted that to carve an exception in the proposed FSIA to permit all traditional admiralty remedies, including prejudgment arrest and attachment, would "...make it very difficult for the State Department to withdraw from decision making in a significant number of cases." MLA Proceedings, May 3, 1974, Doc. No. 583, p. 6295. He went on to note that "...admiralty cases involve a substantial percentage of sovereign immunity cases brought to the State Department by foreign governments." *Id.*

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[8]Former Soviet bloc countries, most of whose ships are state-owned, are frequent purchasers of grain, and their ships frequently call at these ports.

Testimony at hearings on the proposed FSIA also show the concern of the State Department over the diplomatic problems caused by prejudgment seizure of property owned by foreign sovereigns.[9] It should be remembered that one of the main reasons behind the adoption of the FSIA was to remove the State Department from the process of determining when sovereign immunity existed,, with its attendant diplomatic problems. H.R. Rep. No. 823, 100th Cong., 2nd Sess., 1-2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4511; H.R. Rep. No. 1487, 94th Cong., 2nd Sess. 7-8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-6606 The decision below thwarts that purpose and the goal sought by the State Department and the Executive Branch.[10]

II. THE DECISION OF THE COURT BELOW IS WRONG

A. THE DECISION BELOW MISINTERPRETS THE PLAIN LANGUAGE OF § 1605(b) OF THE FSIA

In holding that § 1605(b) FSIA permits *in rem* actions against vessels owned by foreign sovereigns, the Fifth Circuit has disregarded the language of Section 1609 of the Act. That Section provides

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this Chapter.

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[9] *Jurisdiction of U.S. Courts in Suits Against Foreign States, Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2nd Sess. 26, 28 (1976) (statement of Monroe Leigh, Legal Adviser to the Department of State); *Id.* at 97 (statement of Michael Marks Cohen, Chairman, MLA Comm. on Maritime Legislation).

[10] The Court may want to solicit the current views of the United States.

28 U.S.C. § 1609. Section 1610 provides for arrest of a vessel only in connection with the foreclosure of a preferred ship mortgage. It also permits prejudgment attachment if the foreign state has explicitly waived immunity from attachment prior to judgment *and* the purpose of the attachment is to secure satisfaction of the judgment as opposed to obtaining jurisdiction. 28 U.S.C. § 1610. Neither of these exceptions is applicable to this case. There is no suggestion that the foreign sovereign involved has explicitly waived its immunity, and the case does not involve a preferred ship mortgage. Thus, the language of the FSIA prohibits arrest of the TITAN 5 in this case.

In holding that § 1605(b) of the FSIA permits actions *in rem*, the court below indicated that the specific provisions of § 1605(b) took precedence over the general provisions of §§ 1609 and 1610. It is submitted that the court stands this argument on its head. There is nothing in § 1605(b) that specifically permits arrest of, or an *in rem* action against, a vessel. On the other hand § 1609 explicitly forbids arrest of property owned by a foreign sovereign which would, of course, include a vessel. If anything, § 1609 is the specific provision.

More importantly, it is clear that the court below has misread the clear meaning of § 1605(b). That section provides only that a *foreign state* shall not be immune from the jurisdiction of the Courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien on a vessel or cargo of the foreign state. The section does *not* state that a vessel owned by the foreign state loses its immunity. In essence, the section contemplates an action against a foreign state, which is, by definition, only an *in personam* action. This is reinforced by the jurisdictional grant contained in the FSIA which provides:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action *against a foreign state* as defined in section 1603(a)

> of this title *as to any claim for relief in personam* with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement. (Emphasis added).

28 U.S.C. § 1330(a).

A suit against a vessel can only be by way of an *in rem* action where the vessel is the named defendant.[11] Because § 1605(b) does not state that a vessel owned by a foreign state loses its immunity from suit, no *in rem* action or arrest of the vessel is permitted by § 1605(b).

What is contemplated and permitted by § 1605(b), assuming all its requirements are met, is that in such an *in personam* suit, a cause of action to enforce a maritime lien against a vessel (or cargo) of the foreign state may be asserted. While the action itself is an *in personam* action against the foreign state, not an *in rem* action, the case proceeds under the principles of law of an *in rem* suit. In other words, the case is a form of substitute *in rem* suit.

Such a substitute *in rem* suit is not unique to the FSIA. The Suits in Admiralty Act also provides for just such a substitute *in rem* case. Similar to the FSIA, § 741 of the Suits in Admiralty Act prohibits the arrest of U.S. owned vessels. However § 743 of the Act goes on to state:

> Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties.... If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained....

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[11]2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* 478-479 (2d Ed. 1994).

46 U.S.C. § 743. This language provides for a substitute *in rem* action against the United States, while not allowing its vessels to be sued and arrested. The language is almost identical to that of § 1605(c) of the FSIA which provides in pertinent part:

> Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained....

28 U.S.C. § 1605(c). This similarity between the FSIA and the Suits in Admiralty Act is not accidental. The legislative history of the FSIA shows that §§ 1605(b) and (c) were modeled after the Suits in Admiralty Act. See *Foreign Sovereign Immunities Act, Hearings on H.R. 1149, 1689, and 1888 Before the Subcommittee on Admin. Law and Governmental Relations of the House Committee on the Judiciary*, 100th Cong., 1st Sess. 146, 160-161 (1987) (statement of William R. Dorsey, III, Chairman, MLA Comm. to Amend the FSIA).

The reason for having a substitute *in rem* action, i.e., an *in personam* action that proceeds on the principles of an *in rem* case, stems from the fact that, under maritime law, a vessel owner is not necessarily liable for all maritime liens that may arise against the vessel in an ordinary *in personam* action. 2 Schoenbaum, *supra* at 479; Alex T. Howard, Jr., *Personification of the Vessel: Fact or Fiction?* 21 J. Mar. Law and Comm. 319 (1990). For instance, a collision caused by the negligence of a compulsory pilot gives rise to a maritime lien and *in rem* liability against the offending vessel, but not to *in personam* liability of the vessel owner. *The China*, 74 U.S. (7 Wall.) 53 (1868). Similarly, an owner is not liable *in personam* for a maritime lien against a vessel for damage caused by the master or crew while the vessel is under bareboat charter. *The Barnstable*, 181 U.S. 464 (1901). Nor is the owner personally liable

for supply liens that arise as a result of supplies ordered by a charterer. *Belcher Co. v. M/V MARATH MARINER*, 724 F.2d 1161 (5th Cir. 1984). Thus, where no arrest of a vessel or *in rem* action is allowed, a form of substitute *in rem* action against the owner is necessary in order that these types of maritime claims can be enforced. This is what is provided in both the Suits in Admiralty Act[12] and the FSIA.

B. THE DECISION BELOW IS INCONSISTENT WITH OTHER PROVISIONS OF THE FSIA

A full reading of the entire Act also shows the error of the Fifth Circuit decision. If § 1605(b) authorizes *in rem* actions, the language of § 1605(c), which indicates that a § 1605(b) suit is to proceed according to the principles of laws and rules of practice of suits *in rem* would be mere surplusage. The language of § 1605(c) limiting judgment against a foreign state to an amount not greater than the value of the vessel or the cargo upon which the maritime lien arose would also be unnecessary. If a suit is *in rem* against a vessel, there is no judgment against a foreign state, but only against the vessel and any such judgment is necessarily limited to the vessel's value. Similarly, § 1610(e) specifically provides that

> The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

28 U.S.C. § 1610(e). There would be no need for this language if § 1605(b) permitted *in rem* suits. When Congress wished to permit *in rem* suits against vessels, as it did for enforcement of preferred ship mortgage liens in § 1610(e), it said so in explicit terms.

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[12]See *1 Benedict on Admiralty § 131, pp. 8-67 to 8-68 (Steven F. Friedell, ed., 7th ed. rev. 1996).*

C. THE DECISION BELOW IGNORES THE LEGISLATIVE HISTORY OF THE FSIA

The legislative history of the FSIA makes it abundantly clear that, except for foreclosure of preferred mortgage liens, no *in rem* action or arrest of a vessel owned by a foreign sovereign is permitted by the Act. At the time of the initial adoption of the legislation, the section-by-section analysis of § 1605(b) in the House Report on the measure states:

> The purpose of this subsection is to permit a plaintiff to bring suit in a U.S. district court arising out of a maritime lien involving a vessel or cargo of a foreign sovereign without arresting the vessel, by instituting an in personam action against the foreign state in a manner analogous to bringing such a suit against the United States. Cf. 46 U.S.C. 741, *et seq.* In view of section 1609 of the bill, section 1605(b) is designed to avoid arrests of vessels or cargo of a foreign state to commence a suit....

H.R. Rep. No. 1487, *supra* at 1976 U.S.C.C.A.N. 6620. The House Report also indicates that:

> Section 1609 has been amended to make it clear that it applies to arrests of a vessel, as well as to attachment and execution.

Id. at 6610.

The 1988 amendments to the FSIA dealt exclusively with its maritime provisions and were drafted by a committee of the Maritime Law Association. The three amendments proposed by the MLA (1) reduced the severity of the penalties imposed upon a litigant who arrests a vessel with knowledge that it was owned by a foreign state; (2) permitted *in rem* suits against, and arrest of, foreign state-owned vessels to enforce a preferred ship mortgage lien; and (3) added language nearly identical to that contained in the Suits in Admiralty Act to make it clear that § 1605(b), although an

in personam suit, would proceed as a substitute *in rem* suit similar to that provided in the Suits in Admiralty Act. H.R. Rep. 823, *supra* at 1988 U.S.C.C.A.N. 4511-4512. In referring to these changes, William R. Dorsey, III, Chairman of the MLA's Ad Hoc Committee to Amend the Foreign Sovereign Immunities Act, testified in support of the amendments as follows:

> With the adoption of the Foreign Sovereign Immunities Act, the right to commence an *in rem* proceeding by arrest of a vessel or cargo owned by a foreign state was eliminated. Instead, § 1605(b) of the FSIA provides that an action to enforce a maritime lien against a vessel or cargo of a foreign state, which lien is based upon the commercial activity of that foreign state, is commenced by giving notice of the suit to the person having possession of the vessel and by giving notice to the foreign state as provided in § 1608. It is clear that an action under § 1605(b) was to be a substitute for the maritime *in rem* action. No arrest of the vessel was permitted, and once the notice prescribed was given, the action was to proceed as an *in personam* action against the foreign state, but to enforce the maritime lien.

Foreign Sovereign Immunities Act, Hearings on H.R. 1149, 1689 and 1888 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 152 (1987) (statement of William R. Dorsey, III, Chairman, MLA Comm. to Amend the FSIA). In referring to the proposed amendments that added the language taken from the Suits in Admiralty Act, he further testified that,

> In light of the significant distinction between *in rem* and *in personam* claims, it is important to make clear that Section 1605(b) cases are substitute *in rem* cases.... The Suits in Admiralty Act, 46 U.S.C. § 741-752, provides for a form of *in rem* action against the U.S. Government, while

> forbidding the arrest of the vessel or cargo. Language from this Act (46 U.S.C. § 743) has been adopted in H.R. 1149 as part of the proposed recommended amendment to § 1605 of the FSIA.

Id. at 160-161. He went on to indicate that one of the purposes of the 1988 amendments was to make it clear that §1605(b) was intended to be "...a substitute for an *in rem* proceeding" and "...to confirm Congressional intent that actions under § 1605(b) are substitute *in rem* actions, analogous to cases under the Suits in Admiralty Act, U.S.C. §§ 741-752." *Id.* at 146, 161-162.[13]

Apart from the testimony in support of the 1988 amendments, the mere fact of the amendments shows that no arrest *in rem* is permitted by the FSIA. There would have been no need to amend the FSIA to allow arrest of vessels in connection with foreclosure of preferred ship mortgages if the Act already permitted arrest for enforcement of maritime liens. Similarly, the amendment to reduce the penalty for arresting a vessel with knowledge that it was owned by a foreign sovereign from loss of claim[14] to damages for detention would obviously not have been necessary if the FSIA permitted arrest as held by the court below.

D. THE DECISION BELOW IGNORES THE WEIGHT OF AUTHORITY OF REPORTED CASE LAW AND LEARNED COMMENTARY ON THE FSIA

As noted in the Petition for Certiorari, all of the cases on this question, except one, have correctly held that the FSIA does not

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[13]See also *Arbitral Awards, Hearings on H.R. 3106, 3137, 4345 and 4592 Before the Subcomm. on Admin. Law and Governmental Relations of the Comm. on the Judiciary*, 99th Cong. 2nd Sess. 143, 152, 157, 158 (1986) (statement of William R. Dorsey, III, Chairman, MLA Comm. to Amend the FSIA).

[14]As had been held in *Jet Line Services, Inc. v. M/V MARSA EL HARIGA*, 462 F.Supp. 1165 (D.Md. 1978).

permit *in rem* suits and arrest of foreign state-owned vessels in connection therewith. Petition p. 13-14. In addition, the current leading treatise on maritime law states, "The FSIA precludes process *in rem* and admiralty attachment." 2 Schoenbaum, *supra* at 459. See also *1 Benedict on Admiralty* § 130, p. 8-60 (Steven F. Friedell, ed., 7th ed. rev. 1996); A. N. Yiannopoulos, *Foreign Sovereign Immunity and the Arrest of State-Owned Ships: The Need for an Admiralty Foreign Sovereign Immunity Act*, 57 Tul.L.Rev. 1274, 1314 (1983).

The decision of the court below ignores the nearly unanimous case law and the leading treatises on maritime law.

III. THE DECISION BELOW CASTS A CLOUD ON INTERPRETATION OF THE SUITS IN ADMIRALTY ACT

If the Fifth Circuit's interpretation of the FSIA is allowed to stand, it can be argued that the similar language in § 743 of the Suits in Admiralty Act authorizes *in rem* suits and arrest of U.S. owned vessels under Supplemental Admiralty Rule C. The Court should grant certiorari in order to correct the interpretation of an important federal statute, the FSIA, but also to remove the cloud that the court below's decision casts on the Suits in Admiralty Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully Submitted,

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